CARLTON FIELDS

Defenses to International Child Abduction Under the Hague Abduction Convention

December 29, 2011

A parent who moves with a child from the child's home country to another country may face accusations that the move is wrongful. The parent who stays behind may assert the parent who moved committed wrongful child abduction in violation of international law. The parent will certainly face a fact-intensive, international litigation in which the parent must prove legal justification for wrongful removal or retention of the child. This article gives an overview of the various defenses the travelling parent may assert. The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 T.I.A.S. No. 11,670 ("Hague Abduction Convention") establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of time-sharing rights. The International Child Abduction Remedies Act ("ICARA") is the statute in the United States that implements the Hague Abduction Convention. 42 U.S.C. §§ 11601 - 11611. Under ICARA, a person may petition a court authorized to exercise jurisdiction in the country where a child is located for the return of the child to his or her habitual residence in another signatory country, so that the underlying, substantive time-sharing (custody) dispute can be determined in the correct jurisdiction. See 42 U.S.C. § 11603; Hague Abduction Convention, art. 3(a), T.I.A.S. No. 11,670, at 4. A petitioner establishes the elements of wrongful removal or retention under ICARA by demonstrating by a preponderance of the evidence that: (1) the habitual residence of the child immediately before the date of the allegedly wrongful removal or retention was in the country to which return is sought; (2) the removal or retention breached the petitioner's custody rights under the law of the child's habitual residence; (3) the petitioner was actually exercising or would have been exercising custody rights of the child at the time of the child's removal or retention; and (4) the child has not attained the age of 16 years. *See Lops v. Lops*, 140 F.3d 927, 936 (11th Cir.1998). Under the Hague Abduction Convention and the International Child Abduction Remedies Act, when a child has been wrongfully removed from the child's home nation-state or "habitual residence," the court must order the child to be returned to the child's habitual residence, unless the party removing the child can establish at least one of six narrow affirmative defenses. *See Furnes v. Reeves*, 362 F.3d 702, 712 (11th Cir.2004). **First Defense: The**

Non-travelling Parent Was Not Exercising Custody Rights The first defense a travelling parent may raise is that the person having care of the child was not exercising rights of custody at the time of the removal or retention of the child. Although the Hague Abduction Convention does not define "exercise" of rights of custody, courts have found that, in the absence of a ruling from a court in the country of habitual residence, a court should liberally find "exercise" when a parent keeps or seeks to keep any sort of regular contact with his or her child. *See In re Leslie,* 377 F. Supp. 2d 1232, 1243 (S.D. Fla. 2005)("exercise" is liberally interpreted); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1312 (S.D. Fla.2004); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1359 (M.D. Fla. 2002) (father exercised rights by supporting the children and visiting regularly, making decisions about school and attending to his daughter's medical needs); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343-44 (5th Cir. 2004) (father who visited the children 5 times a year and paid child support had exercised custody rights); *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996) (any attempt to maintain a somewhat regular relationship with the child should constitute "exercise" of rights of custody and, once a court finds that the parent left behind exercised custody rights in any manner, "it should stop – completely avoiding the question of whether the parent exercised the custody rights well or badly."); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269 (N.D. Ga. 2004) (father exercised rights of custody by regular involvement with the child's school). While courts applying the Hague Abduction Convention do not consider the merits of parents' underlying custody claims – the goal is to determine whether the child has been wrongfully abducted and, if so, return the child (*see ICARA, 42 U.S.C. § 11601(b)(4))* – proof of a parent's involvement in the child's life or lack of exercise of custody rights is important in both Hague Abduction Convention cases and substantively on the merits in contested time-sharing and relocation cases under Florida law. Under Florida's relocation statute, one factor courts must consider in making determinations about whether to permit or deny relocation is, "the nature, quality, extent of involvement, and duration of the child's relationship with the parent or other person proposing to relocate with the child and with the nonrelocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life." Section 61.13001(7), Florida Statutes (2011). Thus, in Hague Abduction Convention cases brought in Florida for the return of a child to the child's habitual residence, the defending parent may draw guidance about proof of the non-travelling parent's failure to exercise contact with a child from cases discussing the nature, quality and extent of parental involvement or "abandonment" of the child.

Second Defense: The Non-travelling Parent Consented to or Acquiesced to the Move Under Article 13(a) of the Hague Abduction Convention, a court is not bound to order the return of a child if the respondent demonstrates by a preponderance of the evidence that the person having care of the child had consented to prior to the removal or retention or subsequently acquiesced in the removal or retention of the child. Proof of consent or acquiescence by a parent to a child's residing in the foreign country rebuts a claim for "wrongful" removal or retention. *See Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996) (proving acquiescence requires a showing of a formal act or statement, such as testimony or a written renunciation of rights, or a consistent attitude of acquiescence over a significant period of time). Delay in asserting a parent's rights can amount to acquiescence in the removal of the parent's child. *Cf. Garcia v. Angarita*, 440 F. Supp. 2d 1364, 1378 (S.D. Fla.2006) (any

delay by a father, who agreed to allow his children to travel to the United States for a brief visit, in notifying the mother that he objected to the children's relocation to the United States did not constitute acquiescence, because the mother never sought his agreement and he never said or did anything else which evidenced he acquiesced to relocation; she perpetrated relocation through deception and he took action to secure the return of the children); *In re Leslie*, 377 F. Supp. 2d 1232 (S.D. Fla.2005) (a father did not acquiesce in the removal of his son from Belize to the United States, to live with the child's mother and her husband, so as to preclude return of the son to Belize; there was conflicting evidence about whether the mother notified the father of the move, and he aggressively pursued return of the son, both in Belize and the United States). *See also In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004) (a mother's retention of a child in the United States only became wrongful when the child's father became aware of her true intention not to return, even though the father earlier knew the mother and child were not returning on the date they were originally supposed to return and he had agreed to let the child finish the school year; the father made efforts to obtain assistance in Argentina through the Central Authority in obtaining return of the child, rebutting the defense that he acquiesced to the child's removal); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364-65 (M.D. Fla. 2002) (a father was exercising his custody rights over the minor children when their mother removed them from Argentina, even though he was separated from the mother and on a 19-day trip to India when the mother fled; the father had remained in regular contact with the children and paid the family bills). **Third Defense: The Child of Sufficient Age and Maturity Objects to Being Returned** A court is not bound to order the return of a child if the respondent demonstrates by a preponderance of the evidence that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. See Article 13 of the Hague Abduction Convention. Each case is fact intensive. *See Escobar v. Flores*, 183 Cal. App. 4th 737 (3d App. Dist. 2010) (affirming trial court's refusal to return to Chile a 9-year old child, who was extremely communicative, not under any undue influence, and demonstrated sufficient age and maturity to take into account his objection to being returned to Chile)*; Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1259 (M.D. Fla.2008)(a 7-year-old child had not reached an age and degree of maturity; 10-year-old child had reached an age and degree of maturity, but her wishes were ambivalent); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362 (M.D. Fla.2002) (a 9-year-old child had reached an age of maturity such that his views should be considered); *In re D.D.*, 440 F. Supp. 2d 1283, 1297 (M.D. Fla. 2006) (a 6-year-old child had not reached an age and degree of maturity to make it appropriate to take her views into account). In Florida, one time-sharing factor that courts consider is "the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference." *See section 61.13(3)(i), Florida Statutes (2011).* Likewise, in determinations about whether to permit a parent to relocate with a child, courts applying Florida's relocation statute must evaluate among many factors, "the child's preference, taking into consideration the age and maturity of the child." *See section 61.13001(7)(d), Florida Statutes (2011).* **Fourth Defense: The Child is Well-Settled in the New Environment** The child must be returned unless it is demonstrated that the child is now settled in its new environment. Hague Abduction Convention, Article 12. A court is not bound

to order the return of a child if the respondent demonstrates by a preponderance of the evidence that (a) the proceedings were commenced more than one year after the date of the wrongful removal or retention, and (b) the child is now settled in its new environment. *See Wigley v. Hares*, 36 Fla. L. Weekly D1624, 2011 WL 3111898 (Fla. 4th DCA July 27, 2011) (based upon the evidence as found by the trial court, the child had not become "settled" in his environment); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla.2004)(the child was not settled in a new environment in the United States, where the mother was allegedly wrongfully retaining the child, where the child had changed schools and residences approximately five times in the two and one-half years she had been in the United States, and any stability she might have enjoyed was undermined by the mother's uncertain immigration status, even though the child wanted to remain in the United States and appeared to be happy and doing well); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (children removed from Argentina were not well settled in Florida because they had lived in seven different locations during their two years in the United States and had been treated for stress). The *Wigley* court looked to the U.S. State Department for interpretation of what "settled" means: The Convention does not provide a definition of the term "settled." However, the U.S. State Department has declared that "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof." *Public Notice 957, Text & Legal Analysis of Hague International Child Abduction Convention*, 51 Fed.Reg. 10494, 10509 (U.S. State Dep't Mar. 26, 1986). Factors to analyze when considering a "settled environment" defense include:

1. the child's age;
2. the stability and duration of the child's residence in the new environment;
3. whether the child attends school or day care consistently;
4. whether the child has friends and relatives in the new area;
5. the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and
6. the respondent's employment and financial stability. In some circumstances, we will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation.

See Wigley (citing *In re B. Del C.S.B.*, 559 F.3d 999, 1009 (9th Cir.2008)). *See also Litigating International Child Abduction Cases Under the Hague Convention*, National Center for Missing & Exploited Children, Training Manual (2007) at p. 43 n. 175. In addition, some courts consider that the immigration status is a factor in the "settled environment" analysis, even if immediate deportation is not at hand. *See In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y.2001); *see also Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1260 (M.D. Fla.2008) (finding that the children's "residence in this country is not stable because neither [the abducting parent] nor the children have legal alien status and, as such,

are subject to deportation at anytime"). A court may also consider the active measures the person who removed the child has undertaken to conceal the child's whereabouts, as well as the prospect that the abducting parent could be prosecuted for violations of law based on the concealment. *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir.1998); *Wigley v. Hares*, 36 Fla. L. Weekly D1624, 2011 WL 3111898 (Fla. 4th DCA July 27, 2011). **Fifth Defense: There is Grave Risk of Physical or Psychological Harm if the Child is Returned** A court is not bound to order the return of a child if the respondent demonstrates by clear and convincing evidence that there is a grave risk that the child's return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Article 13(b) of the Hague Abduction Convention. Detailed country-by-country information on procedures if a child has been moved to another country is available at U.S. Department of State website. In 2011, the U.S. Department of State's Office of Children's Issues submitted to Congress a report on compliance by treaty members identifying the Department's concerns about fulfillment of their obligations under the Hague Abduction Convention to return children. The report illustrates the various assertions that may be raised by parties or by judicial or governmental authorities called upon to assist with return of children. Although such statistics may assist in establishing the "grave risk of harm" defense, a parent does not need to prove that the child's country of habitual residence is unable or unwilling to protect the child from the grave risk of harm that would accompany the child's return. The trial court found a mother proved the defense of grave risk of harm in denying a father's petition to return the child to St. Kitts, in *Wigley v. Hares*, 36 Fla. L. Weekly D1624, 2011 WL 3111898 (Fla. 4th DCA July 27, 2011). The Fourth District Court of Appeal determined that testimony the child would be upset and would be psychologically harmed by returning him would not meet the grave harm test. But the mother's testimony about threats and abuse by the child's father provided clear and convincing evidence that return would place the child at risk of grave harm. On the other hand, in *Lopez v. Alcala*, 547 F. Supp. 2d 1255 (M.D. Fla. 2008), clear and convincing evidence did not establish such a grave risk that two children would be harmed, if returned to their father in Mexico. Likewise, in *In re D.D.*, 440 F. Supp. 2d 1283, 1298-99 (M.D. Fla. 2006), there was no credible evidence the father had ever physically or psychologically harmed the child and the child's living conditions in France did not evidence intolerable conditions. In *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364-65 (M.D. Fla. 2002), children were ordered to be returned to Argentina, despite testimony by a professor of political science and international studies that Argentina was in a state of economic and civil disorder, posing a risk of harm to the children if they were returned. **Sixth Defense: Fundamental Principles Relating to the Protection of Human Rights and Fundamental Freedoms Do Not Permit Return of the Child** Under Article 20 of the Hague Abduction Convention, a court is not bound to order the return of a child if the travelling parent demonstrates, by clear and convincing evidence, that return of the child would not be permitted by fundamental principles of the country of habitual residence relating to the protection of human rights and fundamental freedoms. The defense is rarely invoked and apparently has not yet been successfully asserted in the United States. *See Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va. 2002) (a search by the court yielded no authority applying the defense). Decisions from other countries under Article 20 are rare. In one such case, recognizing the defense, a Spanish Court

denied a father's petition for return of a child to Israel from Spain. The child and mother were Spanish citizens. The court found that return would be contrary to principles of Spanish law concerning the protection of human rights and basic liberties. Following the parties' divorce and mother's taking the child to Spain, the father applied for and an Israeli court granted him sole custody upon a finding that the mother was 'Moredet," a status under Jewish law meaning she was a 'rebellious wife.' The Spanish court determined this finding would result in the absolute negation of the mother's parental rights and status in the Israeli community and declined to return the child. *In Re S.*, Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a. **Conclusion** Proving claims in international child abduction cases under the Hague Abduction Convention requires analysis and careful development of all evidence and testimony that may support or defeat defenses to claims of wrongful abduction. This article provides a useful framework for such analysis of the defenses that may be raised.

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